

SERVED: March 31, 1994

NTSB Order No. EA-4117

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of March, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

Dockets SE-11803
and SE-11804

GARY L. SWAFFORD and
GARY L. COLEMAN,
Respondents .

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, issued on October 28, 1991, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge dismissed the Administrator's orders suspending respondents' Airline Transport Pilot (ATP)

¹An excerpt from the hearing transcript containing the initial decision is attached.

certificates on allegations of violations of sections 91.9 and 91.87(h) of the Federal Aviation Regulations (FAR) , 14 C.F.R. Part 91.³ Respondent Coleman was also alleged to have violated FAR section 91.75(a) .⁴

²The orders suspended respondent Coleman's ATP certificate for 30 days and respondent Swafford's ATP certificate for 20 days. Respondent Coleman served as the pilot-in-command of civil aircraft N772UP and respondent Swafford served as the second-in-command, on the day in question.

³FAR §§ 91.9 and 91.87(h) [now remodified as §§ 91.13 (a) and 91.129 (h)] provide as follows:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.87 Operation at airports with operating control towers. . . .

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC [Air Traffic Control] . A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to the assigned runway. A clearance to "taxi to" any point other than the assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

⁴FAR § 91.75(a) [now remodified as § 91.123 (a)] provides in pertinent part as follows:

§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. . . .If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

The Administrator's orders, which were filed as the complaints in this consolidated proceeding, alleged that on April 14, 1990, respondents operated civil aircraft N772UP on a flight identified as UPS Flight 2331. ("UPS 2331") . Prior to departing, ATC cleared UPS 2331 to taxi to runway 18L, and UPS 2331 acknowledged that clearance. Contrary to that clearance, the complaints further alleged, respondents taxied the aircraft onto and across runway 18L. The law judge found that, because of what she believed was ATC complicity in the violations, the complaints - should be dismissed. The Administrator asserts on appeal that the initial decision is erroneous and should be reversed. Respondents have filed a brief in reply, urging the Board to affirm the initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in *air* commerce or air transportation and the public interest require partial affirmation of the Administrator's orders. For the reasons that follow, we will reverse the law judge's initial decision, reinstate the FAR violations, but set aside the suspension of respondents' certificates.

The evidence establishes that as respondents prepared to taxi UPS 2331 from the north cargo area of Orlando International Airport, respondent Swafford, who was handling radio communications, contacted ground control. Ground control instructed UPS 2331 to taxi to runway 18L. Respondent Swafford acknowledged the instruction and advised the controller that he

had obtained ATIS information.⁵ Ground control acknowledged this transmission. Ground control then instructed UPS 2331 to remain on the ground control frequency and also advised that UPS 2331 would be sequenced to follow a Midway DC-9 aircraft. Respondent Swafford acknowledged the transmission.

At 11:17:34, ground control advised UPS 2331 that the DC-9 which UPS 2331 was to follow was "just coming up on your left there follow him and the U.S. Air behind him is going to follow you ." (Administrator's Exhibit A-1, Transcript of Communications) . Respondent Coleman acknowledged this instruction. He had just taken over radio communications because respondent Swafford had turned to help the Flight Engineer, who was having a problem with a generator. Coleman testified that as he "rogered" the instruction the aircraft was stopped, about 75 feet short of taxiway bravo and the DC-9 was at least two aircraft lengths down taxiway bravo, approaching UPS 2331 slowly. At 11:17:51, ground control issued the following instruction:

UPS CO twenty three thirty one heavy do cross ah taxiway charlie there and hold short of taxiway bravo to follow your traffic and monitor the tower now on one two four three.

At 11:18:01, respondent Coleman replied,

We're crossing to the right side tower one twenty four three .

The air traffic controller who was working the ground control position testified that when he heard the readback he

⁵ATIS was reporting that 18L was an active runway and that runway 18R was closed.

heard nothing which led him to believe that respondent Coleman misunderstood the instruction.⁶ Accordingly, he took UPS 2331's flight progress strip and handed it to the local controller.⁷ UPS 2331 thereupon taxied across to the right side of runway 18L.

According to respondent Coleman, by the time ground control had instructed UPS 2331 to cross taxiway charlie, taxiway charlie was behind the aircraft and all that was in front of him was runway 18L. In any event, he testified, he believed he had been instructed to cross runway 18L and he read back what he understood the clearance to be. If his readback was erroneous, respondent Coleman reasoned at trial, then ground control should have immediately corrected him.

The law judge found that the Administrator had established the FAR violations alleged in the complaint. (Initial Decision at TR 308) . Nonetheless, because she agreed with respondent that the ground controller failed in his duty to listen to the readback and insure that it was correct, she found that ATC had contributed to the violations and she dismissed the complaints.

The Administrator asserts on appeal that dismissal of the complaints in their entirety was unwarranted. We agree. Board precedent recognizes that when ATC error is the initiating or primary cause of the deviation, the complaint will be dismissed.

⁶He testified that he did not hear the word "we're, " so he believed that respondent Coleman was saying that the DC-9 was crossing his aircraft to the right.

⁷The local controller testified that his focus was on the Midway DC-9, and he did not even see UPS 2331 until after he had cleared the Midway aircraft for takeoff.

See, e.g., Administrator v. Smith, 3 NTSB 85 (1977) ; Administrator v. Dunkel, 2 NTSB 2250 (1976) . However, the record here establishes that the ground controller's instructions to respondents were clear and unambiguous. Respondents were told that they would be sequenced behind other traffic in three separate transmissions. Both respondent Swafford and respondent Coleman acknowledged these instructions. On the third transmission, UPS 2331 was instructed to cross taxiway charlie, hold short at taxiway bravo and follow their traffic. This final instruction was unequivocal, and yet respondents failed to follow it. Instead, they taxied their aircraft in front of that traffic, on taxiway bravo, across an active runway, and toward another runway to which they had never been cleared, and which they knew from the ATIS report had been closed.

In these circumstances, dismissal of the complaint, as proposed by the law judge, is unwarranted. Likewise, respondent s' reliance on Administrator v. Holstein, NTSB Order No. EA-2782 (1988), is misplaced. In Holstein the precipitating factor for the violation was ATC'S failure to exercise reasonable care by issuing a clear instruction. Here, the precipitating factor was respondents' failure to understand a seemingly clear instruction, followed by an uninformative readback.⁸ We will, therefore, affirm the allegations of FAR violations.

⁸The administrative law judge believed the "crossing to the right side" readback to be non-sensical. Without necessarily going that far, we believe that. it was careless not to have included the runway designator in the readback, if the pilot believed himself cleared to cross the active runway.

Notwithstanding the foregoing, respondent Coleman did read back his intentions after ground control's last instruction,⁹ and we cannot disagree with the contention that, having done so, it was then reasonable to expect ATC to correct any error in the readback. As we have noted in the past, readbacks are one of the best means of insuring the accurate understanding of ATC instructions, Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 7 (1993). A readback would be futile if the controller who is receiving it fails to listen carefully and assure that it is consistent with his instruction. Administrator v. Holstein, NTSB Order No. EA-2782 at 8. In this case the ground controller handed-off UPS 2331 to the local controller based on an assumption that the words he heard in the readback were an acceptable reflection of the instruction he had issued. But at trial, the controller's attempt to explain that assumption fell well short of convincing the law judge that it was reasonable. We too are not impressed. As we have had numerous occasions to note in cases such as these, ATC'S own procedures provide that controllers should challenge incorrect or incomplete readbacks.

Board precedent establishes that mitigation of sanction may be appropriate because of ATC involvement in an incident where ATC performance, which would not otherwise excuse a violation, is deficient enough to be contributory. See e.g., Administrator v.

⁹We recognize that respondent Coleman's acknowledgment was far less than the full and clear readback that it should have been.

Alvord, 1 NTSB 1657 (1972) (the controller's failure to respond to a request was at least a contributing factor to that respondent's confusion and no sanction will be imposed) .

Recognizing such precedent, the Administrator allows that a remand to the law judge on the issue of sanction may be an option for consideration. We do not believe a remand would be efficient or fruitful, as we have given the record a thorough review on appeal and would likely be required again to review any subsequent sanction choice by our administrative law judge.¹⁰ Hence, we will make this determination ourselves. Given the serious implications that attach to a finding of a regulatory violation against an air transport pilot, we think affirmance of the violations, without more, is sufficient to the case. Waiver of sanction in its entirety is justified by the failure of ATC to fulfill its obligations to monitor communications for apparent and correctable misunderstandings .

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part;
2. The initial decision is reversed; and
3. The Administrator's orders are affirmed as to the FAR violations, but the suspensions of respondents' ATP certificates are set aside.

VOGT , Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.

¹⁰The administrative law judge who initially heard this proceeding has since retired.